No. 91-7008

In The Supreme Court Of The United States

OCTOBER TERM, 1991

BETHEL TOMMYDEAN MCGLOTHLIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Commonwealth of Virginia, when prosecuting a Defendant for driving a motor vehicle after adjudication as an Habitual Offender, in violation of Section 46.1-387.8 of the Code of Virginia (1950), as amended, must prove by evidence beyond a reasonable doubt that the Defendant had notice of the fact that he had been adjudicated to be an Habitual Offender at the time of, or prior to, his driving the motor vehicle?

PARTIES TO THE PROCEEDING:

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TABLE OF AUTHORITIES:

PRIOR DECISIONS IN THIS CASE

On May 7, 1990, the Court of Appeals of Virginia entered an order awarding an appeal to the Court of Appeals of Virginia. The order was entered in case having record number 1393-89-3 and was unpublished.

An Order of the Court of Appeals of Virginia, together with Memorandum Opinion, denying the Petitioner the relief sought on appeal was entered on April 9, 1991. The order and opinion are unpublished. The case had record number 1393-89-3.

By order dated July 30, 1991, the Supreme Court of Virginia, in case having record number 910674, denied the Petitioner's Petition for Appeal. The order is unpublished.

By order of the Supreme Court of Virginia, entered on the 20th day of September, 1991, the Court denied Petitioner's Petition for Rehearing in case number 910674. The order was unpublished.

GROUNDS OF JURISDICTION

The Petitioner seeks a Writ of Certiorari to the Supreme Court of Virginia. On the 30th day of July, 1991, the Supreme Court of Virginia entered an order refusing the Petitioner's Petition for Appeal from a judgment of the Court of Appeals. The judgment of the Court of Appeals of Virginia had been entered on the 9th day of April, 1991. On the 20th day of September, 1991, the Supreme Court of Virginia issued an order denying Petitioner's Petition for

Rehearing of its July 30, 1991, judgment.

The Petitioner alleges that his rights to notice and Due Process pursuant to the Fifth Amendment to the Constitution of the United States, as well as Section 1 of the Fourteenth Amendment to the Constitution of the United States, have been violated in the State Court proceeding.

Section 1257 of Title 28 of the United States Code confers jurisdiction on the United States Supreme Court to review the judgment in question.

This petition is submitted within ninety days after entry of judgment by the Supreme Court of Virginia denying rehearing. See Supreme Court Rule 13.1.

The judgment appealed from has decided an important question of Federal

law which has not been, precisely, settled by this Court, but should be. The said judgment has been decided in a manner which conflicts with other decisions of the United States Supreme Court. See Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS AND STATUTES:

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Section 46.1-387.1 of the Code of Virginia (1950), as Amended:

Declaration of policy. - It is hereby declared to be the policy of Virginia: (1) To provide maximum safety for all persons who travel or otherwise use the public highways of the State; and

(2) To deny the privilege of operating motor vehicles on such highways to persons who by their conduct and record have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the Commonwealth, the orders of her courts and the statutorily required acts of her administrative agencies; and

(3) To discourage repetition of criminal acts by individuals against the

peace and dignity of the Commonwealth and her political subdivisions and to impose increased and added deprivation of the privilege to operate motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

Section 46.1-387.2 of the Code of Virginia (1950), as Amended:

Habitual offender defined. - An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsections (a), (b) and (c), of this section, committed within a ten-year

period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs on or after June twenty-eight, nineteen hundred sixty-eight, and within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of

separate acts:

(1) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;

(2) Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of Section 18.1-54;

(3) [Repealed.]

(4) Driving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of Sections 18.1-60, 46.1-350 or 46.1-351;

(5) [Repealed.]

(6) Knowingly making any false affidavit or swearing or affirming falsely to any matter or thing required by the motor vehicle laws or as to

information required in the administration of such laws in violation of Section 46.1-15;

(7) Any offense punishable as a felony under the motor vehicle laws of Virginia or any felony in the commission of which a motor vehicle is used;

(8) Failure of the driver of a motor vehicle involved in an accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identity in violation of Section 46.1-176; or

(9) Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an attended or unattended vehicle or other property in excess of two hundred fifty dollars to stop close to the scene of such accident and report his identity or

otherwise report such accident in violation of law.

(b) Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination, in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with an added to those offenses described herein.

(c) The offenses included in subsections (a) and (b) hereof shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the State statutory provisions cited in subsections (a) and (b) hereof and all changes in or amendments thereof, and any federal law, any law of another state or any valid town, city or county ordinance of another state substantially conforming to the aforesaid State statutory provisions.

(d) Any person twenty-one years of age, or older who has been adjudged an habitual offender based in whole or in part on findings of not innocent as a juvenile may petition the court in which he was found to be an habitual offender,

or any circuit court in Virginia having criminal jurisdiction in the political subdivision in which such person now resides, for restoration of his privilege to operate a motor vehicle in this State. Upon such petition, and for good cause shown, such court may, in its discretion, restore to such person the privilege to operate a motor vehicle in this State upon such terms and conditions as the court may prescribe, subject to other provisions of law relating to the issuance of operators' or chauffeurs' licenses.

Section 46.1-387.3 of the Code of Virginia (1950), as Amended:

Commissioner to certify transcript or abstract of conviction record of habitual offender to attorney for Commonwealth; transcript or abstract as

evidence. - The Commissioner of the Division of Motor Vehicles shall certify, substantially in the manner provided for in Section 46.1-34.1, three transcripts or abstracts of the conviction record as maintained in the office of the Division of Motor Vehicles of any person whose record brings him within the definition of an habitual offender, as defined in Section 46.1-387.2 to the attorney for the Commonwealth of the political subdivision in which such person resides according to the records of the Division or the attorney for the Commonwealth of the city of Richmond if such person is not a resident of this State. Such transcript or abstract may be admitted as evidence as provided in Section 46.1-

34.1. Such transcript or abstract shall be prima facie evidence that the person named therein was duly convicted, or held not innocent in the case of a juvenile, by the court wherein such conviction or holding was made, of each offense shown by such transcript or abstract; and if such person shall deny any of the facts as stated therein, he shall have the burden of proving that such fact is untrue.

Section 46.1-387.4 of the Code of Virginia (1950), as Amended:

Information to be filed by attorney for Commonwealth. - The attorney for the Commonwealth, upon receiving the aforesaid transcripts or abstracts from the Commissioner, shall forthwith file information against the person named therein in the court of record having

jurisdiction of criminal offenses in the political subdivision in which such person resides. In the event such person is a nonresident of this State, the attorney for the Commonwealth of the city of Richmond shall file information against the accused person in the Circuit Court of the city of Richmond. The clerk of the Circuit Court of the city of Richmond shall be allowed a fee of five dollars for each such information filed against such nonresident accused to be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in Section 19.1-317 and to be taxed against the defendant as a part of the costs of such proceeding, if the defendant is found to be an habitual

offender. In the event the accused is an inmate of the Virginia State Penitentiary, jurisdiction for the proceedings shall be as provided in Section 53-295.

Section 46.1-387.5 of the Code of Virginia (1950), as Amended:

Show cause order; service on person named as habitual offender; procedure where conviction denied. -The court in which such information is filed shall enter an order, which incorporates the aforesaid transcript or abstract and is directed to the person named therein, to show cause why he should not be barred from operating a motor vehicle on the highways of this State. A copy of the show cause order and such transcript or abstract shall be served on the person named therein in the manner prescribed

by law for the service of notices. In the event such service is by publication, the cost for same shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in Section 19.1-317 and shall be taxed against the defendant as a part of the cost of such proceeding if the defendant is found to be an habitual offender. Service thereof on any nonresident of the State may be made by the Commissioner of the Division of Motor Vehicles in the same manner as in any action or proceeding arising out of a collision on the highways of this State in the manner provided in Section 8-67.1 and 8-67.2, which are hereby made applicable mutatis mutandis to these

proceedings, and the Commonwealth shall pay a fee of five dollars to the Commissioner for making such service and such fee shall be taxed against the defendant as a part of the cost of such proceeding, if he is found to be an habitual offender.

If such person denies he was convicted or held not innocent of any offense necessary for a holding that he is an habitual offender, and if the court cannot, on the evidence available to it, make such determination, the court may certify the decision of such issue to the court in which such conviction or holding of not innocent was made. The court to which such certification is made shall forthwith conduct a hearing to determine such issue and send a certified copy of its

final order determining such issue to the court in which such information was filed.

Section 46.1-387.6 of the Code of Virginia (1950), as Amended:

Order of Court. - If the court finds that such person is not the same person named in the aforesaid transcript or abstract, or that he is not an habitual offender under this article, the proceeding shall be dismissed; but if the court finds that such person is the same person named in the aforesaid transcript or abstract and that such person is an habitual offender, the court shall so find and by appropriate order direct such person not to operate a motor vehicle on the highways of the Commonwealth of Virginia and to surrender to the court all licenses or

permits to operate a motor vehicle on the highways of this State for disposal in the manner provided in Section 46.1-425. The clerk of the court shall file with the Division of Motor Vehicles a copy of such order which shall become a part of the permanent records of the Division.

Section 46.1-387.7 of the Code of Virginia (1950), as Amended:

Period during which habitual offender not to be licensed to operate motor vehicle. - No license to operate motor vehicles in Virginia shall be issued to an habitual offender, (1) for a period of ten years from the date of the order of the court finding such person to be an habitual offender, and (2) until the privilege of such person to operate a motor vehicle in this

Commonwealth has been restored by an order of a court of record entered in a proceeding as hereinafter provided.

Section 46.1-387.8 of the Code of Virginia (1950), as Amended:

Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section. - It shall be unlawful for any person to operate any motor vehicle in this Commonwealth while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used fro the same purposes, provided that the distance

between the said tracts of land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this Commonwealth while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the state correctional facility not less than one nor more than five years or, in the discretion of the jury or the court trying the case without a jury, by confinement in jail for twelve months and no portion of such sentence shall be suspended, except that (i) if the sentence is more than one year in the state correctional facility, any portion of such sentence in excess of one year

may be suspended or (ii) in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this Commonwealth. If the court determines the accused has been so held, it shall

certify the case to the court of record of its jurisdiction for trial.

STATEMENT OF THE CASE AND FACTS

Bethel Tommydean McGlothlin, the Petitioner, (hereinafter referred to was McGlothlin) was arrested on the 22nd day of October, 1988, in Buchanan County, Virginia, upon a warrant charging that he operated a motor vehicle after having been adjudicated to be an Habitual Offender, in violation of Section 46.1-387.8 of the Code.

On the 6th day of February, 1989, the case proceeded to the General District Court of Buchanan County, Virginia, for preliminary hearing. The Judge of the General District Court, having found probable cause, certified

the case to the Grand Jury of the Circuit Court of Buchanan County, Virginia.

On the 10th day of April, 1989, McGlothlin was indicted on the charge by the Grand Jury of the Circuit Court of Buchanan County. The case proceeded to trial on the 8th day of August, 1989. McGlothlin entered a plea of not guilty.

Subsequent to the jury being impaneled, the Commonwealth presented its evidence, which consisted of one witness, Virginia State Trooper Howard Lee Honaker, and three exhibits. Trooper Honaker testified that he was familiar with Bethel Tommydean McGlothlin and indicated that the person whom he knew as Bethel Tommydean McGlothlin was the Petitioner. Honaker further testified that on October 22nd,

1988, at 4:45 p.m. the Trooper made a traffic stop of McGlothlin on U.S. Route 460 at the mouth of Keen Mountain Camp in Buchanan County, Virginia. McGlothlin produced a driver's license.

The Commonwealth submitted two documents in evidence which were abbreviated copies of certified copies of driving records of Tommy Dean McGlothlin and Bethel T. McGlothlin. The records did not indicate whether McGlothlin had been provided with notice of his adjudication as an habitual offender.

The Commonwealth next introduced into evidence an order adjudicating Tommy Dean McGlothlin of Raven, Virginia, to be an Habitual Offender. The order of adjudication was entered on

the 10th day of August, 1977. The order stated that Tommy Dean McGlothlin was not present, in Court, on the date he was adjudicated to be an Habitual Offender. The order did not indicate whether Tommy Dean McGlothlin personally received notice of the proceedings to adjudicate him to be an Habitual Offender. The order indicated that the proceedings were initiated by service, of some type, on McGlothlin of a show cause. The show cause gave notice that the proceedings had commenced and the date of hearing. The order does not indicate, nor did the Commonwealth introduce any evidence, that Tommy Dean McGlothlin was subsequently provided with any notice whatsoever of the outcome of the proceedings, that is, that he was adjudicated to be an

Habitual Offender.

The Commonwealth rested its case. McGlothlin moved to strike the Commonwealth's case based, in part, upon the fact that the Commonwealth had failed to prove, by evidence beyond a reasonable doubt, that McGlothlin had notice of the fact that he had been adjudicated to be an habitual offender and his privilege to drive a motor vehicle revoked. The Court overruled McGlothlin's motion to strike. (Appendix pages 15-21 hereafter App. ____).

McGlothlin presented no evidence, rested, and renewed his motion to strike. The Court overruled the motion to strike (App. 21-22).

The Commonwealth offered Instruction Number 1 setting forth what the Commonwealth stated were the elements of the offense. The Appellant objected to the instruction. The Court granted the instruction as Instruction Number 1 (App. 22-25 and 35-36). Instruction Number 2 was given without objection (App. 25 and 37-38).

Instruction Number 3 was offered, by McGlothlin, setting out as additional elements of the offense that McGlothlin must have notice of the fact that he had been found to be an Habitual Offender and that the Appellant must be proved to be the same person named in the Habitual Offender order. Instruction Number 3 was refused by the Court (App. 25-26 and 39-41). McGlothlin objected to the refusal to grant the instruction.

Instruction Number 7 was offered by McGlothlin. The Instruction provides that McGlothlin must have had notice of the fact that he had been adjudicated to be an Habitual Offender and that his privilege to operate was revoked. The instruction was refused over the objection of McGlothlin (App. 28 and 42).

The Court and McGlothlin's counsel then had discussion regarding the notice requirement (App. 30-32).

The Court read the "given" instructions to the jury. Closing argument was presented. The jury returned a verdict of guilty of the felony charged in the indictment and fixed McGlothlin's punishment at twelve months in the County Jail.

McGlothlin moved the Court to set aside the verdict as being contrary to the law and the evidence based upon the same grounds previously stated. The Court overruled the motion. McGlothlin was allowed to depart on his same bond, the Court having been notified by counsel for McGlothlin that an appeal would be noted (App. 34 and 48).

On August 8th, 1989, the Court entered an order confirming the jury's findings and the proceedings in the case. McGlothlin had not yet been sentenced nor a final order entered (App. 43-49).

On the 21st day of August, 1989, the transcript of the trial was filed in the Clerk's Office of the Circuit Court of Buchanan County.

On the 23rd day of August, 1989, notice of the filing of the transcript was filed in the Clerk's Office of the Circuit Court of Buchanan County, Virginia, by McGlothlin, and the notice was delivered to the Attorney for the Commonwealth.

On the 28th day of August, 1989, McGlothlin, his counsel, and the Commonwealth's Attorney returned before the Judge of the Circuit Court of Buchanan County. McGlothlin was sentenced but allowed to remain upon his same bond pending an appeal to the Court of Appeals. The final order of the Court, in written form, was entered on the 28th day of August, 1989. On that same date McGlothlin's appeal bond was

executed.

McGlothlin filed a Notice of Appeal to the Virginia Court of Appeals, and subsequently, on the 8th day of November, 1989, the record of the proceedings was forwarded by the Clerk of the Circuit Court of Buchanan County to the Court of Appeals.

A Petition for Appeal to the Court of Appeals was filed in a timely manner.

In McGlothlin's Petition for Appeal, he raised the Federal question regarding notice by two arguments, numbered "1" and "3", which stated the following:

"1. The Circuit Court of Buchanan County committed error by failing to strike the evidence of the Commonwealth and failing to set aside the verdict of the jury as being contrary to the law and evidence in that the Commonwealth failed to prove by the evidence beyond a reasonable doubt that the Appellant had notice that he had been adjudicated to

be an Habitual Offender and that his privilege to operate a motor vehicle in the Commonwealth of Virginia had been revoked."

"3. The Circuit Court of Buchanan County committed error by its failure to instruct the jury that the Commonwealth of Virginia must prove, by the evidence beyond a reasonable doubt, that the Appellant had notice of the fact that he had been adjudicated to be an Habitual Offender and that his privilege to operate a motor vehicle in the Commonwealth of Virginia had been revoked."

The foregoing arguments are set forth at pages 15 through 19 and 24 through 25 in the Petition for Appeal to the Court of Appeals of Virginia.

The Court of Appeals of Virginia granted the appeal by order entered on the 7th day of May, 1990 (App. 3-4).

Subsequently, McGlothlin submitted his Appellate Brief which set forth the same assignments of error, and arguments, as related above from the

Petition for Appeal to the Court of Appeals of Virginia.

The Federal Constitutional issues were argued at pages 15 through 21 as well as 26 through 27 of McGlothlin's Appellant Brief (App. 54-68).

By order, as well as unpublished memorandum opinion, both dated the 9th day of April, 1991, the Court of Appeals found no error in the judgment appealed from (App. 5-14). The Court of Appeals ruled that the Commonwealth need not prove, by evidence beyond a reasonable doubt, that the Defendant had notice of his adjudication as an Habitual Offender in order to be convicted pursuant to Section 46.1-387.8 of the Code of Virginia (1950), as amended (App. 11).

McGlothlin thereafter filed his Notice of Appeal to the Supreme Court of

Virginia and subsequently his Petition for Appeal. In McGlothlin's Petition for Appeal he again raised the same assignments of error and arguments as he had in the Court of Appeals. In the Supreme Court, McGlothlin raised those issues as arguments numbered 2 and 4 and further presented arguments numbered 1(b) and 1(c) stating that the Court of Appeals had committed error by not properly ruling upon the notice issues. Those arguments are set out in Petitioner's Petition for Appeal to the Supreme Court of Virginia at pages 19-25 and 30-31.

On the 30th day of July, 1991, the Supreme Court of Virginia entered an order refusing McGlothlin's Petition for Appeal.

McGlothlin filed a Petition for Rehearing once again raising the notice argument (App. 69-72).

On the 20th day of September, 1991, the Supreme Court of Virginia denied the Petition for Rehearing (App. 2).

McGlothlin now files, in the Supreme Court of the United States, his Petition for Writ of Certiorari to the Supreme Court of Virginia.

ARGUMENT

Petition for Writ of Certiorari should be granted in that:

THE COMMONWEALTH OF VIRGINIA, WHEN PROSECUTING A DEFENDANT FOR DRIVING A MOTOR VEHICLE AFTER ADJUDICATION AS AN HABITUAL OFFENDER, IN VIOLATION OF SECTION 46.1-387.8 OF THE CODE OF VIRGINIA (1950), AS AMENDED, MUST PROVE BY EVIDENCE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD NOTICE OF THE FACT THAT HE HAD BEEN ADJUDICATED TO BE AN HABITUAL OFFENDER AT THE TIME OF, OR PRIOR TO, HIS DRIVING THE MOTOR VEHICLE.

In 1968, the Commonwealth of Virginia declared its policy to provide for maximum safety of all persons who travel on the public highways by denying the privilege of operating motor vehicles on those highways to certain persons who by their conduct and record demonstrated an indifference for such safety and to discourage repetition of criminal acts by such individuals. Section 46.1-387.1 of the Code of Virginia (hereinafter the Code).

The Commonwealth instituted that policy by declaring a class of individuals to be Habitual Offenders when those individuals had a certain number of convictions for violation of particular Virginia motor vehicle laws during a ten year period. Section 46.1-

387.2 of the Code of Virginia. When an individual met the criteria set forth by statute, the Commissioner would certify a transcript or abstract of conviction of that individual to the Commonwealth's Attorney in the locality where Court proceedings were to be held. Section 46.1-387.3 of the Code. In turn, the Commonwealth's Attorney would file an Information with the appropriate Circuit Court. Section 46.1-387.4 of the Code.

In response to the Information, the appropriate Circuit Court would issue a Show Cause Order demanding that the person named appear before the Court and show cause why he or she should not be found to be an Habitual Offender and barred from operating a motor vehicle on the highways of the Commonwealth of Virginia for period of ten years.

Section 46.1-387.5 of the Code.

The Show Cause Order was to be served upon the alleged Habitual Offender.

The Court could then, on the hearing date, enter an order fixing that individual's status as an Habitual Offender and barring that person from operating a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten years. Sections 46.1-387.6 and Section 46.1-387.7 of the Code.

A person who had been declared to be an Habitual Offender (that is, been classified with the status of being an Habitual Offender) and whose privilege to operate a motor vehicle on the highways of Virginia was revoked

pursuant to Court order would then be subject to criminal penalties in the event that he or she operated a motor vehicle on the highways of the Commonwealth of Virginia. In fact, the operation of a motor vehicle on the highways of the Commonwealth of Virginia, by such an individual, subjected the individual to conviction for a felony and sentencing to the State Penitentiary for a period of up to five years. Section 46.1-387.8 of the Code.

The record in this case is devoid of any evidence that McGlothlin received notice of his adjudication as an Habitual Offender. It is fundamental that a Defendant must be given notice of a specific disability or requirement placed upon him, if he is to be convicted and punished for violating the

disability or restriction. In Re Lennon, 166 U.S. 548 at 554, 17 S.Ct. 658 at 660, 41 L.Ed. 1110 (1897) and Rollins v. Commonwealth, 211 Va. 438 at 441, 177 S.E. 2d 693 (1970).

Due Process pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States requires that the Defendant, in such proceedings, have notice that his conduct will be violative of law before such conduct may be punished. Lambert v. California, 355 U.S. 225 at 227 and 228, 78 S.Ct. 240 at 243 2 L.Ed. 2d 228 (1957); United States v. Frade, 709 F.2d 1387 at 1392 (CA:11, 1983).

Here, the record and evidence presented by the Commonwealth of Virginia demonstrate that Tommy Dean

McGlothlin was not present at the hearing adjudicating him to be an Habitual Offender. The Commonwealth failed to introduce any evidence that the order of adjudication was either served upon Tommy Dean McGlothlin or mailed to Tommy Dean McGlothlin in accordance with the Court order. The statutes provide for no presumption regarding the receipt of notice in an Habitual Offender proceeding. In addition, the record of the Habitual Offender proceeding was not introduced, here. As a result, the Court and jury were left without any evidence as to whether Tommy Dean McGlothlin actually received notice of the Habitual Offender proceedings. The show cause notice may have been posted, the notice may have been sent to the Secretary of the

Commonwealth, the notice may have been given to a resident of the household at the address in Raven. The notice was not sent (as indicated by the address in the order adjudicating McGlothlin as an habitual offender, and which the Commonwealth introduced into evidence) to the address on record with the Division of Motor Vehicles (which the Commonwealth introduced into evidence) nor was it sent to the purported address of Bethel T. McGlothlin, as shown on a separate record of the Division of Motor Vehicles (which the Commonwealth introduced into evidence). In order for the Court or jury to find that the Appellant had any notice of the fact that he had been adjudicated to have been an Habitual Offender, they would

have to speculate. Even if McGlothlin had notice of the proceedings, that would be insufficient, in that there was no evidence of notice to him that his status as an habitual offender had been ordered by a Court.

In order for the Commonwealth to convict McGlothlin, it must prove, by evidence, beyond a reasonable doubt, that McGlothlin violated the law with notice, that is knowledge, that he was an Habitual Offender. To find such to be the case, the Court would have to first presume that McGlothlin received notice and then, based upon that presumption, presume that he operated the motor vehicle having such knowledge. Such presumptions regarding the state of mind of a Defendant, alleged to have committed an offense, are

unconstitutional. Frances v. Franklin, 471 U.S. 307 at 317; 105 S.Ct. 1965, 1972 and 1973 85 L.Ed. 344 at 355 (1985).

Even if the Commonwealth were permitted to avail itself of any such presumptions, both the record in this case, and logic, would dictate that the Appellant did not have notice of any such adjudication or is not the person adjudicated. When stopped and detained for this offense, the Appellant presented an operator's license. How would a person to whom an operator's license was issued be expected to have notice of an Habitual Offender proceeding.

By the time McGlothlin was detained for the present offense, in excess of

eleven years had transpired since the Habitual Offender adjudication of Tommy Dean McGlothlin. McGlothlin would have been eligible for restoration of his privilege to operate, in accordance with Section 46.1-387.7 of the Code of Virginia (1950), as amended.

Logic dictates that, if the Appellant is the same person who was adjudicated to be an Habitual Offender and, if he had notice of same, he would have had his privilege to operate restored before driving.

If any presumption exists, it is that McGlothlin had no notice of the adjudication.

In that the Commonwealth was unable to prove that McGlothlin had notice of the outcome of the Habitual Offender adjudication proceedings and, in fact,

the Commonwealth's evidence tends to prove that McGlothlin had no notice, the Trial Court ought to have stricken the evidence upon McGlothlin's motions to strike and should have set aside the verdict of the jury as being contrary to the law and the evidence. In addition, the Court erred by not properly instructing the jury. The Circuit Court of Buchanan County had the responsibility in reviewing jury instructions and determining which instructions to offer, to see that the law is clearly stated and that instructions covering all issues, which the evidence fairly raises, are presented to the jury. The jury has to be informed as to the essential elements of the offense and a correct statement

of the law. Darnell v. Commonwealth, 6 Va. App. 485 at page 488, 370 S.E. 2d 717 (1988). The Trial Court below refused to give an instruction regarding the issue of McGlothlin's having received notice that he had been adjudicated to be an Habitual Offender. The instructions offered on that point and refused were Instruction 3 and 7 (App. 39-42). The Trial Court refused both instructions over the objection of McGlothlin. As a result, the jury was not fairly instructed with regard to issues fairly raised at the trial and as to the appropriate law in the case.

As a result of the foregoing, the Court of Appeals of Virginia committed error in failing to set aside the order of conviction of the Circuit Court of Buchanan County and the Supreme Court of

Virginia committed error by failing to set aside the judgment of the Court of Appeals of Virginia.

Clearly, it is well settled law that when a status is conferred upon an individual, such as that of being declared an Habitual Offender, the individual is entitled to notice of that status before he or she may be convicted of conduct which violates the conditions of the status.

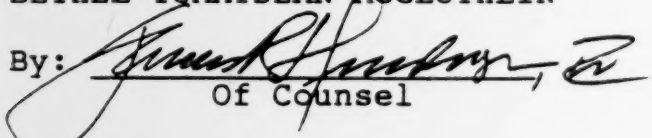
CONCLUSION

In conclusion, the errors committed by the Courts below warrant the United States Supreme Court issuing a Writ of Certiorari to the Supreme Court of Virginia. Your Petitioner, Bethel Tommydean McGlothlin, respectfully petitions this Court for a Writ of

Certiorari to the Supreme Court of Virginia.

RESPECTFULLY SUBMITTED:

BETHEL TOMMYDEAN MCGLOTHLIN

By: 
Of Counsel

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(703) 988-5523
Counsel of Record for Petitioner

APPENDIX

INDEX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 30th day of July, 1991.

Bethel Tommydean McGlothlin,
Appellant,

against Record No. 910674
Court of Appeals No. 1393-89-3

Commonwealth of Virginia,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy Teste: David B. Beach,
Clerk

By: _____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of September, 1991.

Bethel Tommydean McGlothlin,
Appellant,

against Record No. 910674
Court of Appeals No. 1393-89-3

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 30th day of July, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy, Teste:

David B. Beach
Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 7th day of May, 1990.

Bethel Tommydean McGlothlin,
Appellant,

against Record No. 1393-3
Circuit Court No.
64-89

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Buchanan County Before Judges Coleman, Duff and Cole

A judge of this Court having determined that this petition should be granted, an appeal is hereby awarded to the petitioner from a judgment of the Circuit Court of Buchanan County dated August 28, 1989.

No additional bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

A Copy, Teste:

Patricia G. Davis,
Clerk

By: Marty U.P. Ring
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 9th day of April, 1991.

Bethel Tommydean McGlothlin,
Appellant,

against Record No. 1393-89-3
Circuit Court No. 64-89

Commonwealth of Virginia,
Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Buchanan County.

Before Judges Coleman, Keenan and Moon

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the trial court.

A Copy, Teste:

Patricia G. Davis,
Clerk

By: Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Kennan and Moon
Argued at Salem, Virginia

BETHEL TOMMYDEAN MCGLOTHLIN

v. Record No. 1393-89-3
MEMORANDUM OPINION* BY JUDGE SAM W. COLEMAN, III
APRIL 9, 1991

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF BUCHANAN COUNTY
Nicholas E. Persin, Judge

Robert M. Galumbeck (Dudley, Galumbeck & Simmons, on briefs), for appellant.

Kathleen B. Martin, Assistant Attorney General (Mary Sue Terry, Attorney General; Virginia B. Theisen, Assistant Attorney General, on brief), for appellee.

Bethel Tommydean McGlothlin appeals his conviction in the Circuit Court of Buchanan County for a violation of Code Section 46.1-387.8 (now Code Section 46.2-357), driving after having been

adjudicated an habitual offender by the Circuit Court of Tazewell County on August 24, 1977. Finding no error in the judgment of the trial court, we affirm his conviction.

The identity of the accused as the same person who had been adjudicated an habitual offender was the critical issue in this case. When McGlothlin was stopped on October 22, 1988, in Buchanan County, he produced a driver's license in the name of "Bethel Tommydean McGlothlin." The trooper knew he also went by the name of "Tommy Dean McGlothlin" and ran a Department of Motor Vehicles (DMV)

*Pursuant to Code Section 17-116-010 this opinion is not designated for publication.

check for both names. The DMV reply for Tommy Dean McGlothlin indicated he was an habitual offender. On this information, the trooper obtained an arrest warrant. Contrary to McGlothlin's contention, the record shows that the Commonwealth sustained its burden of proving beyond a reasonable doubt that the defendant had been adjudicated an habitual offender. See Brickhouse v. Commonwealth, 208 Va. 533, 536, 159 S.E.2d 611, 613-14 (1968).

We review the evidence in the light most favorable to the Commonwealth, according it all reasonable inferences fairly deducible therefrom. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). The record reveals ample evidence from which the jury could conclude that Bethel

Tommydean McGlothlin and Tommy Dean McGlothlin are the same person. This evidence included the similarities contained in the two DMV driving records admitted into evidence and the uncontradicted testimony of Trooper Honaker, who knew the accused went by both names.

The weight to be given evidence and the reasonable inferences to be drawn therefrom are matters solely within the province of the jury, Cash v. Commonwealth, 5 Va. App. 506, 513, 364 S.E.2d 769, 772 (1988), as are the credibility of a witness and the weight accorded his or her testimony. Schneider v. Commonwealth, 230 Va. 379, 382, 337 S.E.2d 735, 736-37 (1985).

Without conceding that he was the person who had been adjudicated to be an habitual offender by the Circuit Court of Tazewell County, McGlothlin contends that the Commonwealth nevertheless failed to prove beyond a reasonable doubt that he had notice of his status as an habitual offender. The Commonwealth is not required to carry that burden. Code Section 46.1-387.8 (now Code Section 46.2-357) lists the elements the Commonwealth must prove to sustain the conviction for an habitual offender violation: (1) the accused must have been adjudicated an habitual offender, and (2) the accused must have driven while the adjudication order was still in effect. Proof that McGlothlin was adjudicated an habitual offender was satisfied when the Commonwealth

introduced the Tazewell County order into evidence. That adjudication order stated McGlothlin had been served with the necessary show cause order and abstract as required by Code Section 46.1-387.5 (now Code Section 46.2-354). Failure of proper service of process would have rendered the Tazewell Circuit Court without jurisdiction, see Slaughter v. Commonwealth, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981), and the judgment would have been void. The Commonwealth did not have to offer proof beyond the order to show compliance, and McGlothlin did not attempt to assail that judgment as void because of a jurisdictional defect for lack of notice. See Morse v. Commonwealth, 6 Va. App. 466, 468-69, 369 S.E.2d 863, 864

(1988) (citing Slaughter, 222 Va. at 793, 284 S.E.2d at 827). The order also directed the clerk to deliver an attested copy to the sheriff to serve on McGlothlin and, in the event he could not be found, directed the clerk to mail an attested copy to McGlothlin at his last known address.[1] These measures were taken to further assure that McGlothlin had actual notice of the results of the proceeding for which he had been served an order to show cause.

The evidence is uncontroverted that McGlothlin was driving a motor vehicle. As McGlothlin's identity was also established, and because he offered no evidence in his defense, the decision of the jury was neither plainly wrong nor without evidence to support it. We, therefore, must not disturb the

conviction. Code Section 8.01-680.

McGlothlin's final contention that the trial court erred in refusing two of his proffered instructions is also without merit, as they were inaccurate statements of the law.

For the foregoing reasons, the judgment of the Circuit Court of Buchanan County is affirmed.

Affirmed.

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[1] These directions were apparently given because McGlothlin did not attend the adjudication hearing. Code Section 46.1-387.6, describing the procedure once an order of adjudication has been made, did not require service or even mailing of the adjudication order to the habitual offender. It has since been amended, see Code Section 46.2-355, and now requires the clerk to mail a copy of the adjudication order to the habitual offender at his last known address.

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
VS.	)	TRIAL -
	)	CASE NO.
BETHEL TOMMY DEAN MCGLOTHLIN	)	64-89
	)	

TRIAL TRANSCRIPT

PAGES 16-17:

CROSS-EXAMINATION

THE COURT: All right, Mr. Galumbeck.

MR. GALUMBECK: Yes, Your Honor, I have a motion based on two (2) cases, Kayh vs. Commonwealth of Virginia, Bibb vs. Commonwealth of Virginia, I believe the Court's heard both of these motions at other times. I'll deal first with Bibb vs. Commonwealth. In Bibb vs. Commonwealth it deals with driving after having been revoked, which is a lesser

included offense of the driving after adjudicated an habitual offender. In Bibb vs. Commonwealth the defendant protested his finding of guilt based upon the fact that the Commonwealth had not proved by the evidence beyond a reasonable doubt that he in fact knew he was revoked. In this case there has been no evidence whatsoever introduced that this Defendant knew that he was an habitual offender, nor that he knew his privilege to operate a motor vehicle was in fact revoked. If the Court will review the case, and then look at the Court order adjudicating him to be an habitual offender, the Court will find that Tommy Dean McGlothlin, the person adjudicated to be an habitual offender, was not present in court on the date of

the adjudication. Now in the Bibb case, Bibb was present during the hearing relative to his revocation, and he was subsequently revoked. In this case Mr. McGlothlin, if he is the person named in the order, was not present according to the order, and the Commonwealth must show that he had knowledge of the fact that he was adjudicated to be an habitual offender and he was in fact revoked. There is no such evidence in this case, and that evidence could have been easy to come by, by questioning the Defendant.

TRIAL TRANSCRIPT

PAGES 21-33:

..that's a different circumstance.

MR. GALUMBECK: Yes, sir, I understand that.

THE COURT: All right. I just wanted

to see if that was the sole reason you submitted that case to the Court.

Let me see Exhibits One (1), and Two (2), please.

The Court examines the exhibits admitted in evidence.

THE COURT: Mr. Commonwealth's Attorney, let me see the attestation of the certification clause from the Division.

MR. GALUMBECK: Your Honor, the.. the record doesn't show that the Defendant received notice, in fact the Circuit Court record would indicate that he didn't, I just didn't introduce that.

THE COURT: Mr. Galumbeck, I'm going to overrule your Motion to Strike for the following reasons: The cases you

have submitted to the Court, I do not believe the second case is applicable due to the evidence in this case because there has been a positive identification made, and the Court believes that the identification made by Trooper Honaker deals with the weight to be given to that identification as opposed to the admissibility. The charge against the defendant in the Bibb case dealt with driving after having been suspended. There was no identification made, and no showing by the Commonwealth that the Defendant ever knew that he was suspended. In this case you have Trooper Honaker making an identification and telling the Jury that he knows Tommy Dean McGlothlin and Bethel Tommy Dean McGlothlin to be one and the same. You also have the matters dealing with the

addresses and the information from the Division of Motor Vehicles which coincide on Exhibits One (1) and Two (2), and you also have the Court order, Exhibit Number Three (3), which states that, "It is CONSIDERED and ORDERED that the Clerk shall deliver an attested copy of this order to the Sheriff of Tazewell County, who shall serve the same upon the Defendant, and in the event service cannot be had, the Clerk of the Circuit Court of Tazewell County shall mail an attested copy of the order to the Defendant at his last known post office address." All of these circumstances, plus the fact that you have a second driver's license issued in another name, in the opinion of the Court overcome any reasonable inferences your motion does

not overcome, the reasonable inferences to which the Commonwealth's evidence is entitled to at this stage of the trial. The Court feels there is enough evidence for this Jury to convict the Defendant if they believe that he was in fact the operator, and if they believe that Tommy Dean McGlothlin and Bethel Tommy Dean McGlothlin are one and the same to the standard beyond a reasonable doubt, and for those reasons I'm overruling your motion.

Let the Jury come in please. The...

MR. GALUMBECK: Your Honor, if.. we're going to rest.

THE COURT: You are?

MR. GALUMBECK: We are not going to present any evidence.

THE COURT: All right, just let the

Jury stay in the Jury Waiting Room. Let me see you in Chambers and we'll consider the instructions.

MR. GALUMBECK: For the record we would renew our Motion to Strike, same grounds.

THE COURT: All right, the motion is overruled for the same reasons announced by the Court at the close of the Commonwealth's evidence.

The Court, respective counsel, the Defendant, and the Court Reporter withdrew to the Court's Chambers.

THE COURT: All right, what do you say about Number One (1)?

MR. GALUMBECK: If I.. is that the finding instruction, Judge? The instruction...

THE COURT: I just numbered it and

handed it to you, Bob.

MR. GALUMBECK: Yes, sir. The.. we would object to Instruction Number One (1) if it's not introduced with the language that the Defendant had to know that he was an habitual offender and revoked, and that he has to be the same person who is named an habitual offender, or there has to be proof of that. In addition, we would object that there is no instruction with regard to a lesser included offense of driving revoked.

THE COURT: All right, what do you say Mr. Commonwealth's Attorney?

MR. HORNE: Your Honor, the model instruction we believe to be sufficient. Secondly, we didn't charge him with driving revoked. We don't even believe it's a charge that should be considered.

THE COURT: Where did you get this about a lesser included offense under this indictment?

MR. GALUMBECK: The only thing that does not have to be proved for a driving revoked charge...

THE COURT: I'm not asking you that, where did you get the authority for the Court to have to give a lesser included offense for driving revoked on an habitual offender charge?

MR. GALUMBECK: I have no case law for it.

THE COURT: There's no.. this Court has never given it. They may do it in Tazewell County, but Number One (1) will be given. It's right from the model instruction book, and it's a proper instruction. The committee went to a lot

of trouble for five (5) years to get these approved by the Supreme Court.

All right, what do you say about Number Two (2)?

MR. GALUMBECK: I have no objection to that instruction.

THE COURT: All right, Two (2) will be given without objection.

All right, now I'll take up the Defendant's instructions, starting with Number Three (3); all right, Number Three (3) starts.. it's the long one, Mr. Commonwealth's Attorney...

MR. HORNE: Your Honor, we believe that to be repetitious as Number One (1). Number One (1) is the correct statement of the law.

THE COURT: Number Three (3) is refused. You may note your exception.

The Court adequately instructs the Jury in Instruction Number One (1), and that's pointing out other factors having nothing to do with this charge.

All right, what do you say about Number Four (4), that is the Defendant is charged with the crime of driving while his privilege to operate a motor vehicle was revoked.. driving revoked?

MR. HORNE: Your Honor, we would object to that. He's not charged, nor has there been any evidence that he was driving revoked. It's either driving after having been adjudicated an habitual offender or not guilty. We don't believe there is a lesser included offense.

THE COURT: I'm going to sustain the objection. The Defendant is attempting

to bootstrap driving revoked with driving after having been adjudicated an habitual offender. They are separate and distinct charges. If the Jury believes under this evidence that the Defendant was in fact prohibited from operating a vehicle on the public highways of the Commonwealth, and he violated that prohibition, they will find him guilty, if they believe that beyond a reasonable doubt. Driving revoked is not a lesser included offense under this indictment. Four (4) is refused.

Number five (5) does not apply based on the Court's previous instructions because there is not more than one grade of the offense, and therefore the Jury will not be instructed on something that is not before it.

Number Six (6) does not apply because there's only one.. two (2) possible verdicts, "Not Guilty", and "Guilty as charged", so Six (6) will be refused as being an improper instruction to the Jury.

Number Seven (7) is repetitious and is.. the Jury has been properly instructed in Number One (1), and it also shows the revocation aspect, which is not an issue in this case. It would tend to confuse the Jury, and, of course, the Defendant, naturally, excepts to the ruling of the Court on refusing all those instructions.

(Short pause while the Court examines instructions)

THE COURT: This will be Number Eight (8), Number Eight (8) will be

given, Mr. Commonwealth's Attorney.. (the Court reads instruction).. is there any objection, on the record?

MR. HORNE: No, Your Honor.

MR. GALUMBECK: I hope not to use more than ten (10) minutes.

THE COURT: All right, Mr. Commonwealth's Attorney, how much time do you need to argue?

MR. HORNE: Ten (10) minutes is fine.

THE COURT: All right, each side will be granted ten (10) minutes to a side, and the Court will submit the form verdict of either "Guilty", or "Not Guilty" on the charge.

MR. GALUMBECK: And we would note our objection for purposes of the record because it does not include driving revoked. In addition, Your Honor, the

instruction about the Defendant having to know that he was an habitual offender was rejected, will I be permitted to argue that to the Jury, that if he did not know he was an habitual offender and the Commonwealth would have to prove that?

MR. HORNE: Your Honor, it doesn't appear to the Commonwealth that that would be a proper argument that he'd have because he went back.. he ultimately knew because he went back and got another driver's license.

MR. GALUMBECK: I think that's a matter of proof that they can argue...

THE COURT: Well, let me say this, I think he should be permitted to argue it. His Bibb case does not apply. It's a different set of circumstances in this

case. A lot of other things went through the mind of the Court in ruling on the Motion to Strike. First of all you've got two (2) driver's licenses involved; you've got the height and the name, and the eyes, and all of that information that the Trooper has testified about. You have the fact that the officer made the identification. You have the Court order. You have all of those factors, but I think he should be permitted to argue the fact did he know he was an habitual offender in the case. You can argue your evidence from the other standpoint, but yes, I think you should be permitted to argue that.

MR. GALUMBECK: Thank you, sir.

THE COURT: There has to be a certain amount of due process with regard to a charge of operating after

having been adjudicated an habitual offender, and obviously, what's the old thing bout mensrea and malumprohibitum, and all of this thing, you get to whether or not the Defendant knew he was violating the law, I think still applies under this charge, but I don't think the case law that he submitted to the Court is applicable on the Motion to Strike, because of the peculiar evidence in this case.

The Court, respective counsel, the Defendant, and the Court Reporter return to the Courtroom.

The Court summoned the Jury, who returned to the Courtroom and are again seated in the Jury Box.

THE COURT: All right, the Court will come to order. Ladies and Gentlemen

of the Jury Panel, the Defendant guilty of operating a motor vehicle after having been adjudicated an habitual offender, and fix his punishment at twelve (12) months in Jail", and that's signed by Artemia Cochran, Foreman of the Jury. Ladies and the Gentlemen of the Jury, I ask each one of you if that is your verdict so say you all?

All Jurors indicated affirmatively.

THE COURT: Anything before the Court discharges the Jury, Mr. Commonwealth's Attorney?

MR. HORNE: Nothing for the Commonwealth.

THE COURT: Mr. Galumbeck?

MR. GALUMBECK: No, Your Honor.

The Court thanked the Jury and the panel was discharged.

THE COURT: All right, Mr.

Galumbeck, anything further at this time?

MR. GALUMBECK: Yes, Your Honor, we would move to set the verdict aside as being contrary to the law and the evidence, and based upon the same arguments presented during our Motion to Strike, in order to preserve those same grounds.

THE COURT: Mr. Galumbeck, this is an unusual case. I don't believe the cases that you cited to the Court apply to the facts in this case. You have a gentleman that the officer said he knew to be one and the same. You have two (2) different operator's licenses. You have an adjudication, and this was a matter for the Jury to

INSTRUCTION NO. 1

The Court instructs the jury that:

The defendant is charged with the crime of operating a motor vehicle after having been found to be an habitual offender. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant has been found to be an habitual offender and ordered not to operate a motor vehicle on the highways of this State, and

(2) That the defendant operated a motor vehicle on the highways of this State while the order prohibiting his operation of a motor vehicle was in effect.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above

elements of the offense as charged, then you shall find the defendant guilty, and fix his punishment at:

(1) Confinement in the penitentiary for a specific term, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for twelve (12) months.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty.

INSTRUCTION NO. 2

The Court instructs the jury that:

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or

probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

INSTRUCTION NO. 3

The Defendant is charged with the crime of operating a motor vehicle after having been found to be an habitual offender. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the Defendant has been found by a Circuit court of the Commonwealth of Virginia to be an habitual offender and ordered not to operate a motor vehicle on the highways of this State, and

2. That the Defendant is the same person who is named and adjudged in that order, and

3. That the Defendant operated a

motor vehicle on the highways of this State while the order prohibiting his operation of a motor vehicle was in effect, and

4. That the Defendant knew that he had been found to be an habitual offender and that his privilege to operate a motor vehicle had been revoked by the Court.

If you find from the evidence that the Commonwealth has proven each of the above elements of the offense as charged, then you shall find the Defendant guilty, and fix his punishment at:

1. Confinement in the penitentiary for a specific term of not less than one (1) year nor more than five (5) years; or

2. Confinement in jail for twelve (12) months.

If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

INSTRUCTION NO. 7

The Commonwealth must prove, from the evidence beyond a reasonable doubt, that the Defendant knew:

1. That he had been adjudged to be an habitual offender, and

2. That his privilege to operate a motor vehicle in Virginia had been revoked by the Court.

If you do not believe that the Commonwealth has proved both "1" and "2", above, beyond a reasonable doubt, you shall find the Defendant not guilty of driving after having been adjudicated an habitual offender.

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

COMMONWEALTH OF VIRGINIA
PLAINTIFF

VS. CASE NO. 64-89 (OPERATE A MOTOR VEHICLE AFTER HAVING BEEN ADJUDICATED AN HABITUAL OFFENDER)

BETHEL TOMMYDEAN MCGLOTHLIN
DEFENDANT
SSN: 224-15-1901
DOB: MAY 12, 1948

ORDER

Came on the 8th day of August, 1989, the Commonwealth, by its Attorney, Wayne T. Horne, and the Defendant, Bethel Tommydean McGlothlin, who is 41 years of age, having been born on the 12th day of May, 1948, and who stands indicted by a Grand Jury of this Court for the following felony, to-wit:

CASE NO. 64-89 (OPERATE A MOTOR VEHICLE AFTER HAVING BEEN ADJUDICATED AN HABITUAL

OFFENDER)

That on or about October 22, 1988, in the County of Buchanan, BETHEL TOMMYDEAN MCGLOTHLIN did unlawfully and feloniously operate a motor vehicle on the public highway after having been adjudicated an Habitual Offender.

VA. CODE SECTION 46.1-387.8

and the Defendant appeared pursuant to the conditions of his Bond, and came also his Attorney, Robert Galumbeck.

And came Karen Crouse, the Court Reporter, who was sworn to faithfully perform the duties of a court reporter in this case, as the law directs, and the proceedings in this case were recorded by recording equipment pursuant to Virginia Code Section 19.2-165.

The Court finds that the Defendant was granted and given a preliminary hearing in a Court of competent jurisdiction on the aforesaid charges,

prior to the return of the indictment in this case, in conformity with the provisions of Section 19.2-183 of the Code of Virginia.

Thereupon, the Defendant was arraigned on the aforesaid charge, as set out in the indictment of the aforesaid case, and after private consultation with Robert Galumbeck, his Attorney, and being advised by his Attorney, the Defendant entered his plea of Not Guilty in the aforesaid case which plea was tendered by the Defendant in person and the Defendant requested a trial by jury.

The Court, being of the opinion and finding that the Defendant's plea was voluntarily and intelligently made, then impaneled twenty qualified jurors free from exception, for the trial of the

Defendant in the manner provided by law. Whereupon, the Attorney for the Commonwealth and the Attorney for the Defendant each alternately exercised their right to strike the names of four veniremen from the panel, as provided by law, and the remaining twelve jurors, to-wit: Phyllis M. Scott, Pansy Gale Deel, Golden McFarlane, Rhonda R. Bowman, Rebecca Conrad Boyd, Margaret W. Lockhart, Willard Ramey, Leo Bailey, Gary H. Anderson, Margo Layne Keene, Artemia Cochran, and Vivian Ratliff Stiltner, constituting the jury for a trial of the Defendant, were duly sworn.

After opening statements, and the Court and the jury hearing the evidence presented by the Commonwealth, the Attorney for the Defendant moved the

Court to strike the evidence of the Commonwealth, which MOTION was overruled by the Court. At the conclusion of the Defendant's evidence, the Defendant renewed its MOTION to Strike the evidence of the Commonwealth, which MOTION was again overruled by the Court. After hearing the instructions of the Court and arguments of counsel, the jurors were sent to the jury room to consider their verdict. They subsequently returned the following verdict in open Court, to-wit:

"VIRGINIA:

IN THE CIRCUIT COURT OF
BUCHANAN COUNTY

COMMONWEALTH OF VIRGINIA
PLAINTIFF

VS. CASE NO. 64-89 (OPERATE A MOTOR VEHICLE AFTER HAVING BEEN ADJUDICATED AN HABITUAL OFFENDER)

BETHEL TOMMYDEAN MCGLOTHLIN
DEFENDANT
SSN: 224-15-1901
DOB: MAY 12, 1948

We, the jury, find the Defendant guilty of operating a motor vehicle after having been adjudicated an Habitual Offender and fix his punishment at 12 months in jail.

/s/ Artemia Cochran
FOREMAN"

And it being demanded of the Defendant if he had anything to say why judgment should not be pronounced against him, according to law, the Attorney for the Defendant moved the Court to set aside the jury verdict, which MOTION was overruled by the Court; and it is further ORDERED by the Court that sentencing in this case be deferred to a later date, thereupon, the

Defendant is to remain on Bond, and this case is continued.

The Clerk of the Court is hereby ORDERED to send a Teste Copy of this ORDER to each Counsel of Record.

Enter this ORDER this 8th day of August, 1989.

_____, JUDGE
Nicholas E. Persin

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

COMMONWEALTH OF VIRGINIA
PLAINTIFF

VS. CASE NO. 64-89 (OPERATE A MOTOR VEHICLE AFTER HAVING BEEN ADJUDICATED AN HABITUAL OFFENDER)

BETHEL TOMMYDEAN MCGLOTHLIN
DEFENDANT
SSN: 224-15-1901
DOB: MAY 12, 1948

ORDER

Came on the 28th day of August, 1989, the Commonwealth, by its Attorney, Wayne T. Horne, and the Defendant, Bethel Tommydean McGlothlin, and also came his Attorney, Robert Galumbeck, pursuant to an Order entered by the Court on the 8th day of August, 1989, deferring sentencing until this date.

And came Karen Crouse, Court Reporter, who was sworn to faithfully

perform the duties of a court reporter in this case, as the law directs, and the proceedings in this case were recorded by recording equipment pursuant to Virginia Code Section 19.2-165.

The Court, after hearing all the evidence presented in this case, demanded of the Defendant if he had anything to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in the delay thereof, it is, accordingly, the judgment of this Court that the said Bethel Tommydean McGlothlin be, and he is hereby sentenced to Twelve (12) months in the Buchanan County Jail, and that he be required to pay the cost of his prosecution.

Thereupon, the Court advised the Defendant of his right to file a Petition for a Writ of Error with the Court of Appeals of Virginia as to his conviction and sentence in this case.

The Court certifies that at all times during the trial of this case, the Defendant was personally present, and his Attorney was likewise personally present, and capably represented the Defendant in this case.

Thereupon, the Defendant was allowed to remain on his Bond pending an appeal to the Court of Appeals of Virginia, and this case is continued.

The Clerk of the Court is hereby ORDERED to send a Teste Copy of this Order to each Counsel of Record.

Enter this ORDER this 28th day of August, 1989.

_____, JUDGE
Nicholas E. Persin

IN THE

COURT OF APPEALS OF VIRGINIA

RECORD NO. 1393-89-3

BETHEL TOMMYDEAN MCGLOTHLIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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BRIEF PAGES 15-21:

ARGUMENT

ARGUMENT 1. The Circuit Court of Buchanan County committed error by failing to strike the evidence of the Commonwealth and failing to set aside the verdict of the jury as being contrary to the law and evidence in that the Commonwealth failed to prove, by the evidence beyond a reasonable doubt, that the Appellant had notice that he had been adjudicated to be an habitual Offender and that his privilege to operate a motor vehicle in the Commonwealth of Virginia had been revoked.

The record in this case is devoid of any evidence that the Appellant, if he is the same person who was adjudicated to be an Habitual Offender,

had received any notice regarding same. It is fundamental that a Defendant must be given notice of a specific disability or requirement placed upon him, if he is to be convicted and punished for violating the disability or restriction. Bibb v. Commonwealth, 217 Va. 249 at 250 (1971); Rollins v. Commonwealth, 211 Va. 438, 177 S.E. 2d 639 (1970); Calamos v. Commonwealth, 184 Va. 397 35 S.E. 2d, 397 at page 399 (1945).

Due Process pursuant to the Constitutions of the United States and the Commonwealth of Virginia require that the Defendant, in such proceedings, have notice that his conduct will be violative of law before such conduct can be punished. Lambert v. California, 78 S.Ct. 240 at 243 (1957); United States

v. Frade, 709 F.2d 1387 at 1392 (CA:11, 1983).

In Bibb v. Commonwealth, Supra. at 250, the Defendant, Bibb, received notice of and attended a hearing regarding the revocation of his operator's license. No decision was made at the time of the hearing, but Bibb was notified that he would later receive notice of the action taken as a result of the hearing. The Division revoked his privilege to operate a motor vehicle in the Commonwealth of Virginia. Notice of the revocation was forwarded to Bibb at his last known address. Bibb had moved prior to the notice arriving and had left no forwarding address. The notice indicated that it had been returned and undelivered. The Supreme Court of Virginia held that the State could not

avail itself of the statutory presumption that Bibb knew that his license was revoked because the evidence indicated he had not received the notice of revocation. The Court further found that the Commonwealth must prove that Bibb knew that his privilege to operate was revoked in order to convict him of driving after revocation. The Commonwealth had not proved Bibb had notice of revocation, by the evidence beyond a reasonable doubt. As a result, Bibb's conviction was reversed.

In the case at bar, if the Appellant is in fact the same person as the Tommy Dean McGlothlin, who was adjudicated to be an Habitual Offender, the record and evidence presented by the Commonwealth of Virginia indicate that

Tommy Dean McGlothlin was not present at the hearing adjudicating him to be an Habitual Offender (A.P. 66). The Commonwealth failed to introduce any evidence that the order of adjudication as either served upon Tommy Dean McGlothlin or mailed to Tommy Dean McGlothlin in accordance with the Court order. The statutes provide for no presumption regarding the receipt of notice in an Habitual Offender proceeding. (Such a presumption existed by statute in the Bibb case). In addition, the record of the Habitual Offender proceeding was not introduced, here. As a result, the Court and jury were left without any evidence as to whether Tommy Dean McGlothlin actually received notice of the habitual Offender proceedings. The notice may have been

posted, the notice may have been sent to the Secretary of the Commonwealth, the notice may have been given to a resident of the household at the address in Raven. The notice was not sent (as indicated by the address in the order) to the address on record with the Division of Motor Vehicles (as indicated in Exhibit 1, A.P. 64) or the purported address of Bethel T. McGlothlin (Exhibit 2, A.P. 65). In order for the Court or jury to find that the Appellant had any notice of the fact that he had been adjudicated to have been an Habitual Offender (if he is in fact the same Tommy Dean McGlothlin), they would have to speculate. Even if the Appellant had notice of the proceedings, that would be insufficient, as indicated by the Bibb

case, wherein Bibb actually attended the proceedings but did not receive notice of the result of the hearing.

In order for the Commonwealth to convict the Appellant, it must prove, beyond a reasonable doubt, that Appellant violated the law with notice, that is knowledge, that he was an Habitual Offender. To find such to be the case, the Court would have to first presume that the Appellant received notice and then, based upon that presumption, presume that he operated the motor vehicle having such knowledge. Such presumptions regarding the state of mind of a Defendant alleged to have committed an offense are unconstitutional. Frances v. Franklin, 105 S.Ct. 1965, 1972 and 1973 (1985).

Even if the Commonwealth were

permitted to avail itself of any such presumptions, both the record in this case and logic would dictate that the Appellant did not have notice of any such adjudication or is not the person adjudicated. When stopped and detained for this offense, the Appellant had an operator's license. How would a person to whom an operator's license was issued be expected to have notice of an Habitual Offender proceeding?

Assuming that the operator's license issued to Bethel T. McGlothlin was that of the Appellant (while not conceding that point), that license was first issued in August 23rd, 1983, more than six years after the August 10th, 1977, adjudication of Tommy D. McGlothlin as an Habitual Offender. At

that time, if the Appellant were the person who had been adjudicated an habitual Offender, he was eligible to obtain restoration of his privilege to operate, in accordance with Section 46.1-387.9:2 of the Code of Virginia (1950), as amended.

By the time the Appellant was detained for the present offense, in excess of eleven years had transpired since the habitual Offender adjudication of Tommy Dean McGlothlin. If the Appellant were that Tommy Dean McGlothlin, he would have been eligible for restoration of his privilege to operate, in accordance with Section 46.1-387.9 of the Code of Virginia (1950), as amended.

Logic dictates that, if the Appellant is the same person who was

adjudicated to be an Habitual Offender and, if he had notice of same, he would have had his privilege to operate restored. In fact, he did produce a driver's license.

If any presumption exists, it is that the Appellant is not the person adjudicated or he had no notice of the adjudication.

In that the Commonwealth was unable to prove that the Appellant had notice of the outcome of the habitual Offender adjudication proceedings and, in fact, the Commonwealth's evidence tends to prove that the Appellant had no notice (he was not at the hearing and he had a valid operator's license at the time he was arrested), the Court below ought to have stricken the evidence upon the

Appellant's motions to strike and should have set aside the verdict of the jury as being contrary to the law and the evidence. For the foregoing reasons, the judgment below ought to be reversed and the indictment dismissed.

BRIEF PAGES 26-27:

ARGUMENT 3. The Circuit Court of Buchanan County committed error by its failure to instruct the jury that the Commonwealth of Virginia must prove by the evidence beyond a reasonable doubt that the Appellant had notice of the fact that he had been adjudicated an Habitual Offender and his privilege to operate a motor vehicle in the Commonwealth of Virginia had been revoked.

As set forth in "Argument Number 1", above, which argument is

incorporated herein by reference as if fully set forth, the Appellant has demonstrated that the Court and jury must be convinced by evidence, beyond a reasonable doubt, that a Defendant had notice of the fact that he had been adjudicated to be an Habitual Offender and that his privilege to operate a motor vehicle in the Commonwealth of Virginia had been revoked by the Court. Also, as pointed out in Argument number 1, there was no evidence to support that finding and, as a result the matter was in dispute. The Circuit Court of Buchanan County has the responsibility in reviewing jury instructions and determining which instructions to offer, to see that the law is clearly stated and that instructions covering all

issues, which the evidence fairly raises, are presented to the jury. The jury has to be informed as to the essential elements of the offense and a correct statement of the law. Darnell v Commonwealth,. 6 Va. App. 485 at page 488, 370 S.E. 2d 717 (1988). The Court below refused to give an instruction regarding the issue of the Appellant's having received notice that he had been adjudicated to be an Habitual Offender (if he in fact had been). The instructions offered on that point and refused were Instructions 3 and 7. The Court refused both instructions over the objection of the Appellant. As a result, the jury was not fairly instructed with regard to issues fairly raised at the trial and as to the appropriate law in the case. As a result, the verdict and

the order of the Court below ought to be reversed and the case dismissed.

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 910674

BETHEL TOMMYDEAN MCGLOTHLIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

PETITION FOR REHEARING

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Counsel for Appellant

PETITION PAGES 2-3:

There may be some confusion with regard to the Appellant's position. The Appellant does not contend that he is not a habitual offender nor does the Appellant contend (as stated by the Court of Appeals in their decision) that the Court adjudicating him to be an habitual offender was without jurisdiction. The Appellant has never challenged the authority of that Court to adjudicate him to be an habitual offender nor the fact that he has properly been adjudicated to be an habitual offender. The Appellant merely challenges the fact that, regardless of whether he is an habitual offender, that he can be convicted of operating a motor vehicle after having been adjudicated an habitual offender, if he does not have

Notice of the fact that he has been so adjudicated and further that the Commonwealth must prove that the Defendant has been so noticed in order to obtain such a conviction.

The foregoing position is in accord with Bibb v. Commonwealth, Id. In that case the Defendant's license had been properly revoked. In fact, the Defendant had been present at the hearing concerning the revocation of his operators license. However, after his operators license was properly revoked, the Defendant did not receive Notice. The Supreme Court of Virginia determined that the Commonwealth must prove that the Defendant had Notice of revocation. Id.

For the same reasons, and reasons

previously stated in the Petition for Appeal, the Appellant in the case at bar must have had Notice of the fact of his adjudication as an habitual offender prior to his being convicted of driving after adjudication. The Commonwealth must have proved such notice, by the evidence beyond a reasonable doubt.